



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OFFICE OF WATER

February 16, 2022

The Honorable Jon Ossoff  
United States Senate  
Washington D.C. 20510

Dear Senator Ossoff:

Thank you for your December 20, 2021 letter requesting that the U.S. Environmental Protection Agency (EPA) exercise its "special case" authority to revoke the approved jurisdictional determination (AJD) that the U.S. Army Corps of Engineers (Corps) issued in October 2020 for the proposed Twin Pines mine located next to the Okefenokee Swamp.

EPA recognizes the importance of protecting wetlands and the value of the Okefenokee in particular. Indeed, EPA has identified it as an Aquatic Resource of National Importance. However, EPA cannot use its special case authority to revoke the Corps' October 2020 AJD. An AJD is a final agency action that is "binding on the Government and represent[s] the Government's position in any subsequent Federal action or litigation concerning that final determination." *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 598 (2016), quoting the 1989 Memorandum of Agreement Between the Department of the Army and the U.S. Environmental Protection Agency Concerning the Determination of Geographic Jurisdiction of the Section 404 Program (1989 MOA). The 1989 MOA states that "[i]t shall be the policy of the Army and EPA for the Corps to continue to perform the majority of the geographical jurisdictional determinations," but also establishes that there may be "special cases" involving "a circumstance where EPA makes the final determination of the geographic jurisdictional scope of waters of the United States for purposes of section 404 [of the Clean Water Act]." 1989 MOA Sections II and III. While the 1989 MOA provides the process by which EPA notifies the Corps that EPA, rather than the Corps, will make a final determination, it does not provide any process for EPA to revoke a final jurisdictional determination by the Corps, such as the October 2020 AJD, once the Corps has issued it.

However, the Corps does have the authority to revise its AJDs based on new information. *Hawkes*, 578 U.S. at 598, citing the Corps' Regulatory Guidance Letter No. 05-02 (dated June 14, 2005) sec. 1(a) at 1. It is our understanding that you are requesting the Corps to use this authority to rescind the October 2020 AJD.

If you would like to discuss the Corps' authority to revise its AJDs further, please contact Stacey Jensen, Assistant for Regulatory and Tribal Affairs in the Office of the Assistant Secretary of the Army for Civil Works, at [stacey.m.jensen.civ@army.mil](mailto:stacey.m.jensen.civ@army.mil) or (703) 459-6026. EPA would also be glad to discuss this further; please contact Denis Borum in EPA's Office of Congressional and Intergovernmental Relations at [borum.denis@epa.gov](mailto:borum.denis@epa.gov) or (202) 564-4836.

Sincerely,

A handwritten signature in black ink, appearing to read "Radhika Fox", is positioned above the name and title.

Radhika Fox  
Assistant Administrator